

# Book Review

*The Unwanted Gaze: The Destruction of Privacy in America,*  
Rosen, Jeffrey (Random House, Inc., 2000, \$24.95)

*Reviewed by Ronald Turner†*

## I. INTRODUCTION

What is it about statutes prohibiting discrimination in employment related matters that prompts calls for the abolishment or repeal of such laws? Milton Friedman argued in the early 1960's that state laws prohibiting employment discrimination by reason of race, color, or religion "clearly involve[] interference with the freedom of individuals to enter into voluntary contracts with one another."<sup>1</sup>

If it is appropriate for the state to say that individuals may not discriminate in employment because of color or race or religion, then it is equally appropriate for the state, provided a majority can be found to vote that way, to say that individuals must discriminate in employment on the basis of color, race or religion. The Hitler Nuremberg laws and the laws in the Southern states imposing special disabilities upon Negroes are both examples of laws similar in principle . . . .<sup>2</sup>

More recently, other commentators have called for the abolition and repeal of Title VII of the Civil Rights Act of 1964 (Title VII)<sup>3</sup> and that

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1. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 111 (1962).

2. *Id.* at 113. Opposed to governmental intervention in these matters, Friedman concluded that the "appropriate recourse for those of us who believe that a particular criterion such as color is irrelevant is to persuade our fellows to be of like mind, not to use the coercive power of the state to force them to act in accordance with our principles." *Id.* at 115.

3. 42 U.S.C. § 2000e *et seq.*

statute's prohibition of employment discrimination on the basis of race, color, religion, sex, or national origin as applied to private-sector employers.<sup>4</sup> Professor Richard Epstein, writing in 1992, declared that "the entire apparatus of the antidiscrimination laws in Title VII should be repealed insofar as it applies to private employers . . . ."<sup>5</sup> Dinesh D'Souza has similarly called for a repeal of the statute; in his view, the "law should be changed so that its nondiscrimination provisions apply only to government."<sup>6</sup> Charles Murray has proposed that all antidiscrimination laws should be repealed and replaced with a constitutional amendment prohibiting certain discrimination as well as all laws limiting the freedom of association for private individuals and associations.<sup>7</sup>

An abolitionist proposal of a smaller scale and more limited scope is found in a chapter of a recent book by Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America*.<sup>8</sup> Professor Rosen calls for the elimination of the ban on hostile-environment sexual harassment,<sup>9</sup> one aspect of Title VII's sex-discrimination prohibition. Why propose the abandonment of a cause of action providing a legal claim and possible

4. See 42 U.S.C. § 2000e-2(a)(1).

5. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 9 (1992).

6. DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 544 (1995). D'Souza makes this proposal in support of "a long-term strategy that holds the government to a rigorous standard of race neutrality, while allowing private actors to be free to discriminate as they wish." *Id.*

7. CHARLES MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN: A PERSONAL INTERPRETATION* 79 (1997). Murray believes that "[i]ndividuals and private groups may accept, reject, embrace, ignore, hire for, fire from, lease to, evict from, anyone for any reason." *Id.* at 81.

8. See JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 91-127 (2000).

9. Hostile or abusive work environment harassment involves unwelcome conduct of a sexual nature that is "sufficiently severe or pervasive to alter the conditions of [the target's] employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). See also CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 40 (1979) (discussing how hostile environment harassment "simply makes the work environment unbearable. Unwanted sexual advances, made simply because she has a woman's body, can be a daily part of a woman's work life").

A separate category of workplace, referred to as *quid pro quo* (play-or-pay or put out or get out) harassment, involves situations in which targeted employees must comply with a harasser's demand for sexual favors or suffer tangible and adverse job actions. See generally *Jones v. Flagship Int'l*, 793 F.2d 714, 721-22 (5th Cir. 1986); STEPHEN J. SCHULFHOFFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 175 (1998); Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J. L. PUB. POL. 307 (1998). A tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

remedy for the vast majority of sexual harassment cases?<sup>10</sup> According to Rosen, “the hostile environment test has proved more distracting than clarifying in identifying illegal gender discrimination, and it should be eliminated.”<sup>11</sup> Emphasizing that his “goal is not to eliminate sexual harassment law, but to rethink it in a way that is consistent with the principles of classical liberalism,” Rosen argues that in “cases where sexually offensive speech or conduct has no tangible or intangible job consequences . . . invasion of privacy law may be better equipped than discrimination law to distinguish between indignities that are merely embarrassing and those that are serious enough to be illegal.”<sup>12</sup>

In this article, I address Rosen’s proposal. After providing an overview of Title VII sexual harassment law and jurisprudence in Part II (made necessary by Rosen’s imprecise account of the state of the law in that area), I address and critique the specifics of Rosen’s proposition and its underlying rationales in part III. There, I argue and conclude that Rosen’s proposal is problematic in several critical respects and should not be adopted. In my view, legal recognition of sexual harassment as sex discrimination violative of Title VII properly provides an actionable and, if proven, remediable claim specifically aimed at the particular dynamics and effects of workplace harassment, and more effectively targets those who would themselves target and disadvantage others in the workplace because of their sex than would the privacy law regime urged by Rosen. Presently, employees alleging hostile-environment harassment can now bring Title VII *and* pendent state law invasion of privacy claims in one proceeding, thereby challenging alleged misconduct on both antidiscrimination and privacy grounds. Thus, Rosen’s call for the elimination of the statutory environmental claim would remove an important and established weapon from their arsenal, and would limit the hostile-environment plaintiff to a common law privacy claim that may be as - if not more - distracting and less protective of the rights and interests of employees and employers than the current state of Title VII law and doctrine.

## II. TITLE VII SEXUAL HARASSMENT LAW AND JURISPRUDENCE

Title VII provides that it is unlawful for employers to discriminate in

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10. See Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 565 (2001) (stating that the bulk of [federal court] sexual harassment cases involve hostile environment claims; almost 70% of the cases only include a hostile environment claim, while another 22.5% combine a hostile environment claim with a quid pro quo claim).

11. ROSEN, *supra* note 8, at 111.

12. *Id.* at 23. See also Jeffrey Rosen, *Fall of Private Man*, NEW REPUBLIC: A JOURNAL OF POLITICS AND THE ARTS, June 12, 2000, at 22 (arguing for abandonment of the hostile-environment sexual harassment test).

employment matters on the basis of race, color, religion, sex, or national origin.<sup>13</sup> The sex discrimination prohibition was a last minute floor amendment to H.R. 7152, the bill that was ultimately enacted into law as the Civil Rights Act of 1964.<sup>14</sup> When proposed in the United States House of Representatives by Representative Howard Smith (D.-Va.) in an unsuccessful attempt to stop the passage of the legislation,<sup>15</sup> the House “erupted in shock as the full import of the amendment sank in.”<sup>16</sup> After two hours of debate,<sup>17</sup> the attempted sabotage of the legislation failed and

13. See 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

See also 42 U.S.C. § 2000e-2(b)-(d) (prohibiting discrimination by employment agencies, labor organizations, and training programs).

14. See Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in various sections of 20 U.S.C., 29 U.S.C., and 42 U.S.C.).

15. For discussions of this effort to derail the legislation, see TAYLOR BRANCH, PILLAR OF FIRE: AMERICAN IN THE KING YEARS 1963-1965 at 231-33 (1998); EPSTEIN, *supra* note 5, at 278; HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENTS OF NATIONAL POLICY 1960-1972 at 12, 136-38 (1990); ROSEN, *supra* note 8, at 95-96; Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997); John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1338-39 (1989).

16. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115 (1985).

17. Arguing in favor of the amendment, Michigan Democrat, Representative Martha Griffiths warned that “a vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister.” 110 Cong. Rec. 2580 (1964). Katherine St. George, a Republican representative from New York, argued:

We do not want special privilege. We do not need special privilege. We outlast you. We outlive you. We nag you to death. So why should we want special privileges? I believe that we can hold our own. We are entitled to this little crumb of equality. The addition of that little, terrifying word, “s-e-x,” will not hurt this legislation in any way. 110 Cong. Rec. 2580-81 (1964).

Three other female representatives—Frances Bolton (R.-Ohio), Catherine May (R.-Wash.), and Edna Kelly (D.-N.Y.) supported the amendment. See WHALEN & WHALEN, *supra* note 16, at 117. Opposing the amendment, the bill’s floor manager, New York Democratic Representative Emmanuel Celler, spoke of the “delightful accord” in his home and stated: “I usually have the last two words and those words are, ‘Yes, dear.’” 110 Cong. Rec. 2684 (1964). Another opponent, Representative Edith Green (D.-Ore.), fearing that she would be

the sex discrimination ban was part of Title VII of the Civil Rights Act as signed into law by President Lyndon Johnson on July 2, 1964.<sup>18</sup>

What is “discrimination” under, and in violation of Title VII? Notably absent in the text of the statute as enacted in 1964 is any definition of or guidance concerning the meaning of, and the methodology to be employed in applying, the antidiscrimination mandate. Thus, and not surprisingly, courts have engaged in gap-filling and have supplied judicially-created operational definitions and analyses when dealing with and answering the question whether an employer unlawfully discriminated against an individual because of race, sex, or some other protected characteristic.<sup>19</sup> This point should be kept in mind when the discussion turns to judicial consideration of the question whether sexual harassment constitutes unlawful sex discrimination under Title VII.

The antidiscrimination principle holds generally, that an employee is entitled to work free from an employer’s consideration of the individual’s protected status in the employer’s decisionmaking. As the employer subject to Title VII must ignore certain characteristics of individuals,<sup>20</sup> employees are, as a matter of law, raceless, sexless, etc., when they come to and enter the workplace, and are to be treated and evaluated on the basis of criteria not proscribed by Title VII. Where an employer “races” or “sexes” an individual in compensation, terms, conditions, or privileges of employment, the employer engages in conduct violative of the statute.<sup>21</sup>

Stating the point differently, and focusing on the question of sex discrimination, an employer must de-sex employees and not discriminate

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called an Uncle Tom or Aunt Jane, argued that sex discrimination was different from race discrimination. 110 Cong. Rec. 2584 (1964). *See also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (stating that “the principal argument in opposition to the amendment was that ‘sex discrimination’ was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment”).

18. 42 U.S.C. § 2000e-2(a).

19. On judicial gap-filling in the interpretation and application of statutes, see CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 118 (1990); William N. Eskridge, Jr. & Judith N. Levi, *Regulatory Variables and Statutory Interpretation*, 73 WASH. U. L.Q. 1103, 1111 (1995); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205, 226 (2000).

20. *See* Owen Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237 (1971).

21. *See* Charles Lawrence, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 443 n.52 (1990). A person is “raced” “through a constellation of practices that construct and control racial subjectivities.” Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806-07 (1993). I analogize and extend the concept of being “raced” to an individual who is “sexed” by practices constructing and controlling sexual subordination, including such subordination by and through workplace sexual harassment.

against them because of their sex.<sup>22</sup> Accordingly, an employer who, because of sex, refuses to hire an applicant, or pays a similarly situated employee a lesser amount for the same work, or subjects a worker to more onerous and adverse working conditions, engages in conduct violative of Title VII.<sup>23</sup> “In each such case, the employer violates Title VII by offering terms and conditions to employees of one gender that are less favorable than those it offers to employees of the other gender.”<sup>24</sup> Sexual harassment, “a species of gender discrimination,”<sup>25</sup> is one of those less favorable and more onerous terms and conditions of the workplace.

In entering into and remaining in workplaces free (as a matter of law if not as a matter of fact and reality) from discrimination on the basis of race, color, sex, religion, and national origin, employees are better able to pursue their goals and objectives as workers, including the forging of an identity, making money, developing business and personal relationships, and interacting with others socially and politically.<sup>26</sup> Banning discrimination in the workplace provides for the possibility of dignity at and in the particular context of work for the person who seeks to “gain livelihood for oneself and one’s family,” “have self-respect,” and attempts to “‘make a difference’ through social responsibility.”<sup>27</sup> That person is legally entitled to work and to receive the benefits thereof without having to face the barriers imposed by and the inequities of racism, sexism, and other discriminatory factors.

Judicial recognition of the proposition that the centuries-old problem of sexual harassment<sup>28</sup> is also a question of sex discrimination under Title

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22. There are exceptions to this proscription. Title VII is not violated where an employer hires and employs workers on the basis of sex “in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .” 42 U.S.C. § 2000e-2(e). Nor is the statute violated where an employer considers sex as one factor in making employment decisions pursuant to a voluntary affirmative action plan. See *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987).

23. With regard to the latter example, consider this observation by a federal court of appeals: “If because she was a woman [the employer] had turned down the heat at her work station in order to make her uncomfortable, that would be actionable sex discrimination, even if the discomfort inflicted was too mild to be described as ‘suffering.’” *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1011 (7th Cir. 1994) (citation omitted).

24. *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000).

25. *Id.*

26. See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000).

27. PAULA M. RAYMAN, *BEYOND THE BOTTOM LINE: THE SEARCH FOR DIGNITY AT WORK* 22 (2001).

28. “The use of sex as a weapon of inequality has a long history. Across the centuries, enslaved women, factory women, waitresses, and domestic workers have been especially vulnerable to men’s sexual impositions.” GWENDOLYN MINK, *HOSTILE ENVIRONMENT: THE POLITICAL BETRAYAL OF SEXUALLY HARASSED WOMEN* 24 (2000).

VII was not arrived at overnight. As I have detailed elsewhere,<sup>29</sup> Congress did not intend to ban sexual harassment when it enacted the statute in 1964.<sup>30</sup> Initial court decisions declined to hold that sexual harassment violated Title VII, reasoning that such harassment was a “personal proclivity, peculiarity, or mannerism,”<sup>31</sup> worrying about “a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another,”<sup>32</sup> and concluding that Title VII was “not intended to provide a federal tort remedy” for workplace sexual harassment.<sup>33</sup>

Unlike these early decisions, activists, scholars, and the Equal Employment Opportunity Commission (EEOC) advanced the view that sexual harassment was a violation of the statute.<sup>34</sup> Notably, Professor Catherine MacKinnon’s influential 1979 book on sexual harassment defined such harassment as:

unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another. The major dynamic is best expressed as the reciprocal enforcement of two inequalities.

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29. See Ronald Turner, *The Unenvisioned Case, Interpretive Progression, and the Justiciability of Title VII Same-Sex Sexual Harassment Claims*, 7 DUKE J. GENDER L. & POL’Y 57, 61-64 (2000); Ronald Turner, *Same-Sex Sexual Harassment: A Call for Conduct-Based and Gender-Based Applications of Title VII*, 5 VA. J. SOC. POL’Y & L. 151, 155-56 (1997).

30. See Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 23 (1998) (noting that “the Congress that enacted Title VII was arguably not even concerned about male-on-female sexual harassment, much less male-on-male harassment”).

31. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975).

32. *Id.* at 163-64.

33. *Tomkins v. Public Service Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976), *rev’d*, 568 F.2d 1044 (3d Cir. 1977).

34. For discussions detailing these developments, see CARROLL BRODSKY, *THE HARASSED WORKER* (1976); LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* (1978); MACKINNON, *supra* note 9; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Turner, *The Unenvisioned Case*, *supra* note 29, at 64-65. In September 1980, the EEOC issued guidelines stating that sexual harassment violated Title VII and defining harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, and (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a).

When one is sexual, the other material, the cumulative sanction is particularly potent . . . . Sexual harassment may occur as a single encounter or as a series of incidents at work. It may place a sexual condition upon employment opportunities at a clearly defined threshold, such as hiring, retention, or advancement; or it may occur as a pervasive or continuing condition of the work environment.<sup>35</sup>

Federal courts began to recognize the sexual harassment cause of action. In the view of one court, the "plain meaning of the term 'sex discrimination' as used in the statute encompasses discrimination between genders whether the discrimination is the result of a well-recognized sex stereotype or for any other reason."<sup>36</sup> The United States Court of Appeals for the District of Columbia Circuit, recognizing the claim in *Barnes v. Costle*, opined that "[i]t is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job."<sup>37</sup> In a later case, that same court held that an employee could be unlawfully harassed because of sex even where the employee was not deprived of tangible job benefits.<sup>38</sup> And another federal appeals court, ruling in 1982, concluded: "A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment."<sup>39</sup>

The "harassment-is-discrimination" view was ultimately adopted by the Supreme Court of the United States in *Meritor Sav. Bank, FSB v. Vinson*,<sup>40</sup> wherein a unanimous Court held that hostile environment sexual harassment violated Title VII. The allegations of sexual harassment made by Michelle Vinson against her supervisor, vice president Sidney Taylor, were as follows. According to Vinson, Taylor suggested that he and Vinson go to a motel to have sexual relations and that, fearing that she would lose her job, she agreed; that Taylor made repeated demands for sex during and after working hours; that she had sexual intercourse with him forty or fifty times; and that Taylor fondled her in front of other employees, followed her into a women's restroom, exposed himself to her, and raped

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35. MACKINNON, *supra* note 9, at 1-2. For discussions of the influence of MacKinnon's scholarship on the law of sexual harassment, see *Henson v. City of Dundee*, 682 F.2d 897, 908 n.18 (D.C. Cir. 1982); LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 229-230 (1998); RICHARD A. POSNER, *SEX AND REASON* 32 (1992).

36. *Williams v. Saxbe*, 413 F. Supp. 654, 657-58 (D.D.C. 1976).

37. 561 F.2d 983, 989-90 (D.C. Cir. 1977) (footnote omitted).

38. See *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

39. *Henson*, 682 at 902.

40. 477 U.S. 57 (1986).



her on more than one occasion.<sup>41</sup> Taylor, asserting that Vinson made these allegations in response to a business dispute, denied these allegations, as did his employer, the bank.<sup>42</sup> Vinson was ultimately discharged by the bank for excessive use of sick leave.<sup>43</sup>

Writing for the Court, Justice (now Chief Justice) Rehnquist stated: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminate[s] on the basis of sex."<sup>44</sup> The language of Title VII "is not limited to economic or tangible discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."<sup>45</sup> Noting the EEOC's guidelines on sex discrimination<sup>46</sup> and concluding that the guidelines "appropriately drew from, and were fully consistent with, the existing case law,"<sup>47</sup> Rehnquist reasoned that the guidelines "fully support the view that harassment leading to noneconomic injury can violate Title VII," and that certain conduct can constitute sexual harassment "whether or not it is directly linked to the grant or denial of an economic *quid pro quo*."<sup>48</sup> Court decisions following the issuance of the guidelines "have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."<sup>49</sup> Justice Rehnquist then quoted a 1982 decision by the United States Court of Appeals for the Eleventh Circuit:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run the gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.<sup>50</sup>

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41. *Id.* at 60.

42. *Id.* at 61.

43. *Id.* at 60.

44. *Id.* at 64 (internal quotation marks omitted).

45. *Id.* at 64-65 (internal quotation marks omitted).

46. *See supra* note 34.

47. *Meritor*, 477 U.S. at 66. Justice Rehnquist cited *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), and other decisions prohibiting workplace harassment on the basis of race, religion, and national origin. In *Rogers*, the court opined that "employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase 'terms, conditions, or privileges of employment' . . . is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." *Id.* at 238.

48. *Id.* at 65.

49. *Id.* at 66.

50. *Id.* at 67 (quotation marks omitted) (quoting *Henson*, at 902.)

Cautioning that not all conduct described as “harassment” violates Title VII, the Court instructed that the alleged sexual advances must be unwelcome<sup>51</sup> and that, “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.”<sup>52</sup> Vinson’s allegations included “not only pervasive harassment but also criminal conduct of the most serious nature” and “are plainly sufficient to state a claim for ‘hostile environment’ sexual harassment.”<sup>53</sup>

The Supreme Court returned to the hostile environment claim and issue in *Harris v. Forklift Systems, Inc.*<sup>54</sup> There, Teresa Harris, a manager, complained that the company’s president, Charles Hardy, said to her in the presence of other employees, “You’re a woman, what do you know” and “[w]e need a man as the rental manager.”<sup>55</sup> On other occasions, the president called the plaintiff “a dumb ass woman,” suggested that he and the plaintiff “go to the Holiday Inn to negotiate” her raise, asked the plaintiff and other women employees to obtain coins from his front pants pocket, asked the plaintiff and other female employees to pick up objects he had thrown on the ground, and made sexual remarks and innuendoes about women employees’ clothing. When Harris complained to Hardy regarding his conduct, he responded that he was only joking, apologized to her, and promised that he would stop. A few weeks later, however, he asked Harris (again in the presence of other employees and while she was working on a deal with a customer), “What did you do, promise the guy . . . some [sex] Saturday night?”<sup>56</sup> Harris resigned her employment with the company.<sup>57</sup>

A unanimous Court, in an opinion by Justice O’Connor, held that an abusive work environment could be actionable even though the plaintiff was not psychologically harmed. Reaffirming *Meritor*, the Court opined that its 1986 decision and the standard enunciated therein took a “middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.”<sup>58</sup> Title VII “comes into play before the harassing conduct leads to a nervous breakdown,” Justice O’Connor wrote, and an abusive work environment offends the statute’s “broad rule of workplace equality,” detracts from job performance, discourages job retention, and can end an employee’s career

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51. *Id.* at 68.

52. *Id.* at 67 (quotation marks and citation omitted).

53. *Id.*

54. 510 U.S. 17 (1993).

55. *Id.* at 19.

56. *Id.*

57. *Id.*

58. *Id.* at 21.

advancement.<sup>59</sup>

The Court also set forth an objective and subjective analysis applicable to hostile-environment cases:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.<sup>60</sup>

Conceding that there is no “mathematically precise” test applicable to hostile environment cases, the Court called for a totality-of-the-circumstances analysis and an examination of the following factors, among others: “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”<sup>61</sup>

Concurring, Justice Ginsburg wrote that the “critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>62</sup> The dispute adjudicator’s inquiry “should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance,” and it would be sufficient to prove that “a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.”<sup>63</sup>

In 1998, the Court issued three Title VII sexual harassment decisions. The first, *Oncale v. Sundowner Offshore Servs. Inc.*,<sup>64</sup> held that actions for same-sex (male-on-male or female-on-female) sexual harassment were actionable under the statute. Consider the allegations made by the plaintiff, Joseph Oncale, against his male coworkers. According to Oncale, his

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59. *Id.* at 22.

60. *Id.* at 21-22.

61. *Id.* at 23. In a concurring opinion, Justice Scalia expressed his concern that the Court’s holding “lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages.” *Id.* at 24 (Scalia, J., concurring). He saw no alternative to the Court’s approach, however, and accepted *Meritor*’s interpretation of Title VII as the law. [T]he test is not whether work has been impaired, but whether working conditions have been discriminatorily altered. I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts.” *Id.* at 25 (Scalia, J., concurring).

62. *Id.* at 25 (Ginsburg, J., concurring).

63. *Id.* (citation, quotation marks, and brackets omitted).

64. 523 U.S. 75 (1998).

coworkers restrained him while a supervisor placed his penis on Oncale's neck and, on another occasion, on his arm; the supervisor and a male coworker threatened to rape Oncale; and, while Oncale showered on the employer's premises, the supervisor pushed a bar of soap into Oncale's anus.<sup>65</sup> Oncale asserted that he was forced to leave his job when management did nothing to address his complaints concerning his supervisor's and coworkers' conduct.

Justice Scalia, writing for a unanimous Court, concluded that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."<sup>66</sup> Noting and rejecting the observation of some courts that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," Scalia reasoned that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."<sup>67</sup>

The *Oncale* Court cautioned that Title VII only prohibits discrimination because of sex and does not prohibit all verbal or physical workplace harassment.<sup>68</sup> Workplace sexual harassment is not "automatically discrimination because of sex merely because the words used have sexual content or connotations. The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."<sup>69</sup> Furthermore, Scalia continued, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex . . ."; discrimination may be found where the evidence shows "that the harasser is motivated by general hostility to the presence of women in the workplace."<sup>70</sup> Title VII is not a "civility code" and "does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."<sup>71</sup>

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65. See *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

66. 523 U.S. at 79. See also *id.* (stating that there is "no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII").

67. *Id.* at 79. See also Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (Amy Gutmann ed., 1997) ("It is the law that governs, not the intent of the lawgiver.").

68. *Oncale*, 523 U.S. at 80.

69. *Id.* (quotation marks and citation omitted).

70. *Id.*

71. *Id.* at 81.

Justice Scalia also emphasized that the challenged conduct must be objectively severe or pervasive (“an environment that a reasonable person would find hostile or abusive”), reasoning that this requirement was “sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation – for discriminatory conditions of employment.”<sup>72</sup> In addition, the conduct must be subjectively severe or pervasive as “judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances . . . .”<sup>73</sup> In all harassment cases careful consideration must be given to the “social context in which particular behavior occurs and is experienced by its target.”<sup>74</sup> No simple rule can be formulated to cover all claims, in the Court’s view. “The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”<sup>75</sup> Judges and juries can “distinguish between simple teasing and roughhousing” by using “[c]ommon sense, and an appropriate sensitivity to social context . . . .”<sup>76</sup>

The second and third of the 1998 decisions, taking up an issue noted but not decided by the Court in *Meritor*,<sup>77</sup> both held, in identical language, that employers are vicariously liable for hostile environments created by

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72. *Id.* (quotation marks omitted).

73. *Id.*

74. *Id.*

75. *Id.* at 81-82.

76. *Id.* at 82.

77. The *Meritor* Court declined to issue a definitive ruling on the issue of employer liability for supervisory sexual harassment, but did hold that employers were not automatically liable for such harassment and that the absence of notice to the employer of the harassment did not necessarily insulate the employer from Title VII liability. 477 U.S. at 72. In addition, *Meritor* rejected the employer’s argument that it could not be held liable because it had a grievance procedure and antidiscrimination policy, noting that the employer’s position “might be substantially stronger if its procedures were better calculated to encourage victims to come forward.” *Id.* at 73. The policy in that case required employees to first complain to their supervisor, in that case the alleged harasser.

Justice Marshall, joined by Justices Brennan Blackmun and Stevens, argued for a rule under which an employer would be liable for supervisory harassment, regardless of the employer’s knowledge. The employer is liable when a supervisor fires or refuses to promote a black worker, Marshall stated, and “courts do not stop to consider whether the employer otherwise had ‘notice’ of the action, or even whether the supervisor had actual authority to act as he did.” *Id.* at 75 (Marshall, J., concurring) (citations omitted). Seeing no justification for a special rule of liability in hostile environment harassment cases, Marshall would have applied the same rule of liability applied in Title VII cases and would have held “that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave ‘notice’ of the offense.” *Id.* at 78 (Marshall, J., concurring).

supervisory employees, subject to a two-prong affirmative defense.<sup>78</sup>

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>79</sup>

In so holding, the Court reasoned that the affirmative defense would encourage employer foresight, promote conciliation rather than litigation, and serve the statute's deterrent purpose by encouraging employees to report harassment before it became severe or pervasive and therefore actionable.

Beyond their specific holdings, *Ellerth* and *Faragher* provided thoughtful analyses of workplace dynamics and power relationships. In *Ellerth*, the plaintiff alleged that her supervisor subjected her to constant sexual harassment and stated to her, "you know, Kim, I could make life very hard or very easy at Burlington" and told her that she was not "loose enough."<sup>80</sup> On other occasions he rubbed her knee, said to her "you're gonna be out there with men who work in factories, and they certainly like

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78. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). This affirmative defense is not available "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808 (citation omitted). For an excellent discussion of these decisions, see Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671 (2000).

79. *Ellerth*, 524 U.S. at 765 (citation omitted); *Faragher*, 524 U.S. at 807 (citation omitted). The Court added:

While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

*Id.*

80. 524 U.S. at 748.

women with pretty butts/legs,” stated during a telephone conversation “I don’t have time for you right now, Kim . . . unless you tell me what you’re wearing,” and asked if she was “wearing shorter skirts yet . . . because it would make your job a whole heck of a lot easier.”<sup>81</sup> The plaintiff subsequently quit her job, explaining in a letter to the employer that she quit because of the supervisor’s behavior. Justice Kennedy’s opinion for the Court, discussing non-tangible sexual harassment, stated that “a supervisor’s power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor is always aided by the agency relation.”<sup>82</sup> In cases of tangible job actions resulting from harassment, supervisors have been “empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control,” and such “actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.”<sup>83</sup>

In *Faragher*, the allegations of sexual harassment included claims that a male supervisor repeatedly touched the bodies of female employees, put his arm around the female plaintiff and touched her buttocks, simulated a sexual act which resulted in contact with a female lifeguard, made a derogatory comment about the plaintiff’s shape, and told a woman during an interview that female lifeguards had sex with male lifeguards and inquired whether she would do so. Another male supervisor tackled the plaintiff, told her that he would have sexual relations with her but for what he considered to be an unattractive physical characteristic, pantomimed oral sex, made repeated and crude sexual references, remarked upon the bodies of female lifeguards and visitors to the beach, and told female lifeguards that he would like to have sex with them.<sup>84</sup> In holding that the employer was vicariously liable for this conduct, Justice Souter’s opinion for the Court noted that it “is by now well recognized that hostile environment sexual harassment by supervisors (and, for that matter, co-employees) is a persistent problem in the workplace” and an issue that employers can reasonably anticipate.<sup>85</sup> Supervisors “have special authority enhancing their capacity to harass” and “there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship.”<sup>86</sup> Furthermore, the justice stated, the recognition

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81. *Id.*

82. *Id.* at 763 (citation omitted).

83. *Id.* at 762.

84. 524 U.S. at 782.

85. *Id.* at 798.

86. *Id.* at 800, 802 (citations omitted). *See also id.* at 803 (noting that a supervisor’s “actions necessarily draw upon his superior position over the people who report to him, or those under him, whereas an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a co-worker”).

of liability for supervisory hostile environment harassment “is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.”<sup>87</sup>

In its most recent pronouncement on the issue of hostile-environment harassment, *Clark County School District v. Breeden*,<sup>88</sup> the Court held that no reasonable person could have believed that the single incident challenged by the plaintiff – the reading of and laughter concerning a sexually explicit statement in an applicant’s evaluation report – violated Title VII.<sup>89</sup> The plaintiff’s job required her to review the statement as part of the employer’s screening of applicants, the Court reasoned, and the plaintiff had “conceded that it did not bother or upset her” to read the statement.<sup>90</sup> The supervisor’s and male co-worker’s comments and chuckling “both are at worst an ‘isolated incident’ that cannot remotely be considered ‘extremely serious’, as our cases require . . . .”<sup>91</sup>

As can be seen in this primer for the uninitiated and refresher for the knowledgeable, the current state of sexual harassment law and jurisprudence reflects and is built upon years of activist, scholarly, administrative agency, and judicial consideration of the reality of, and the need for a legal remedy to address, workplace harassment. Individuals are entitled to work without being subjected to sex discrimination and a subset thereof, hostile environment sexual harassment, defined as unwelcome conduct of a sexual nature so severe or pervasive that the targeted employee’s employment conditions are altered and an abusive or hostile working environment is created. This prohibition of sexually harassing conduct is an elaboration of Title VII’s antidiscrimination principle<sup>92</sup> and responds to and addresses the adverse consequences and manifestations of sexual harassment such as lower job satisfaction, voluntary turnover, greater use of sick leave, reduced productivity, increased absenteeism, and feelings of discomfort, anger, guilt, and fear.<sup>93</sup> These consequences of

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87. *Id.* at 803.

88. 121 S.Ct. 1508 (2001) (per curiam).

89. The plaintiff, her male supervisor and another male employee met to review psychological evaluation reports of job applicants. One applicant’s report stated that the applicant had said to a coworker, “I hear making love to you is like making love to the Grand Canyon.” The supervisor said to the plaintiff, “I don’t know what that means.” The other male employee said, “Well, I’ll tell you later” and both men chortled. *Id.* at 1509.

90. *Id.* at 1510.

91. *Id.* (citation omitted).

92. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1239 (2001).

93. See David N. Laband & Bernard F. Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594 (1998); See also L. Camille Hebert, *Analogizing Race and Sex in Workplace*



harassment make “it more difficult for workers to perform their assigned tasks, thereby disadvantaging them relative to workers who are not obliged to endure this behavior.”<sup>94</sup>

While the line drawn between and separating that which is unwelcome and unlawful and that which is not illegal and is not subject to legal sanction may be obvious in some cases and difficult to draw in others,<sup>95</sup> the law and policy discussed in this part evinces a legislative and judicial determination that Title VII has marked a defensible and, in my view, desirable boundary beyond which the *quid pro quo* and hostile environment harasser may not and must not go. This determination is fundamentally and foundationally about sex and (and sex at) work.<sup>96</sup> More specifically, it is about the ways in which an individual’s sex is seen as and is turned into an impediment and a weapon of exclusion in the hands of those who seek to perpetuate subordinating sexual and sexist boundaries and to promote and protect their notions of the proper inhabitants of certain workplaces and spaces. Failure to recognize these reasons for and manifestations of sexual harassment, or to comprehend the full dimension and the dynamics of the problem, misidentifies the reality of sexual harassment and incorrectly treats it solely as a matter of sex and privacy.<sup>97</sup> Such a view is problematic:

Because a harasser’s conduct involves sex, it is tempting to excuse that conduct as “just about sex” and therefore walled off in a zone of privacy. The sex in sexual harassment, however, is not mutual, and its private impact has public consequences. Sex is at once a means and an end for the harasser: a means to exert power and an end secured by power (including, sometimes,

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*Harassment Claims*, 58 OHIO ST. L.J. 819, 839-40 (1997) (noting that “the physical and psychological symptoms reported by individuals who have been subjected to sexual harassment are similar to the effects reported by targets of racial harassment and include headaches, backaches, nausea, weight loss or gain, insomnia, depression, and nervousness”).

94. Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1218 (1998).

95. Then Chief Judge Richard Posner, writing for the Seventh Circuit, commented on this aspect of the law:

Drawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers . . . . It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other . . .

*Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995) (citations omitted).

96. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991).

97. See Vicki Schultz, *Sex is the Least of It*, NATION, May 25, 1998, at 11.

force). The sex in sexual harassment is an imposition, a cause of harm, a source of inequality; as such, it is never "just about sex" but always about power. It injures never from boorish inadvertence and always from subordinating action.<sup>98</sup>

Power and subordination, gender dominance and resistance to changing realities and norms in the workplace: these employment-related problems addressed by Title VII go beyond privacy concerns (which are clearly implicated by harassing conduct) and address the real harms and disadvantages of sexual harassment.

### III. PROFESSOR ROSEN'S PROBLEMATIC ANALYSIS AND PROPOSAL

In chapter three of *The Unwanted Gaze*, entitled "Jurisprudence," Professor Rosen declares that "something has gone wrong in the law of sexual harassment."<sup>99</sup> In his view, a "legal cause of action originally designed to protect the privacy and dignity of women and men in the workplace has, on several occasions, permitted unreasonable invasions of the privacy and dignity of men and women in the workplace."<sup>100</sup> His solution to this perceived problem: the elimination of the Title VII hostile-environment sexual harassment cause of action. That recommendation and Rosen's supporting arguments are addressed in this part.

Citing the experiences of "two innocent third parties" (Monica Lewinsky and Celia Farber) involved in sexual-harassment lawsuits brought by Paula Jones<sup>101</sup> and Staci Bonner,<sup>102</sup> Rosen contends that "the experiences of Lewinsky and Farber are symptoms of a broader problem with harassment law, which threatens not only the privacy of innocent bystanders but also the boundaries between the private and public spheres."<sup>103</sup>

At the outset, it is important to note that additional examples and a systemic as opposed to anecdotal approach would have provided greater assurance that there is indeed a problem in this area of law. Grounding problem-description and solution in a few famous/infamous cases can

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98. MINK, *supra* note 28, at 27.

99. ROSEN, *supra* note 8, at 94.

100. *Id.*

101. *See Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998), *appeal dismissed*, 138 F.3d 758 (8th Cir. 1998). For discussion of this litigation and related events, see ANDREW MORTON, *MONICA'S STORY* (1999); RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* (1999); JEFFREY TOOBIN, *A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT* (1999).

102. *See Bonner v. Guccione*, 1997 U.S. Dist. LEXIS 11382 (S.D.N.Y. 1997), *aff'd in part and vacated in part*, 178 F.3d 581 (2d Cir. 1999).

103. ROSEN, *supra* note 8, at 94.

create the illusion of trouble and can mistakenly raise the exception to the level of the quotidian. Notoriety should not be confused with typicality, and we should exercise great care and caution when considering the elimination of an established cause of action and doing so on the basis of one or a few cases with which we may disagree, for leading or well known cases may well be atypical and present "distorted representations of . . . federal sexual harassment cases."<sup>104</sup> Reactive policy recommendations driven by anecdotes may lead to conclusions and reforms that would not be reached under a broader and more systematic review of cases and data providing "useful antidotes to the tendency to generalize too far from a handful of cases."<sup>105</sup> One can thus concede, for the sake of argument, that the privacy of Lewinsky and Farber were unduly invaded without reaching the conclusion that such conduct is indicative of all or most or many sexual harassment cases. Whether that ensnarement is predominant or common enough such that a cause of action should be abolished is a question that should be considered and answered on the basis of something more than impressions of and reactions to a few cases.

Seeking to "resurrect[ ] some of the privacy we have lost,"<sup>106</sup> Professor Rosen contends that the "solution . . . lies in returning to the text of the Civil Rights Act of 1964, which properly ensures that no American should have decisions about his or her livelihood turn on his or her sexuality."<sup>107</sup> The law should forbid "[a]ny speech or conduct that limits an employee's professional status or opportunities, or affects the terms and conditions of employment, because of sex—including not only explicit and implicit sexual threats but also employment decisions based on stereotypical views of the individual's abilities . . ."<sup>108</sup> This understanding of Title VII would seem to (in my view does) apply to environmental harassment, as that form of harmful misconduct can limit an employee's professional status or opportunities. The employee subjected to sexual innuendo and ridicule may be deprived of her rightful and necessary authority and standing in the workplace where, for example, a company president uses sexual remarks to ridicule and belittle her in front of the very workers she supervises.<sup>109</sup> Similarly, an employee subjected to sexual assaults and other unwelcome and offensive conduct may experience adverse effects on their employment opportunities, including their ability to

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104. Juliano & Schwab, *supra* note 10, at 552.

105. *Id.* at 592. See also RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 357 (2001) (noting the pitfalls in relying on anecdote to shape public policy).

106. ROSEN, *supra* note 8, at 94.

107. *Id.*

108. *Id.*

109. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), discussed *supra* notes 54-63 and accompanying text.

continue in their jobs.<sup>110</sup> Rosen then states that:

[S]peech and conduct that other employees may find offensive, but that are not severe or pervasive enough to change the terms and conditions of employment, should be regulated by invasion of privacy law rather than by employment discrimination law. Whenever the conduct in question can't be viewed as a clear case of gender discrimination—in cases involving consensual affairs, offensive jokes, and vulgar e-mail—I will argue that invasion of privacy law is better suited than the Supreme Court's "hostile environment" test to distinguish between relatively trivial indignities and those that are serious enough to be illegal.<sup>111</sup>

This passage is somewhat confusing given the current state of the law.<sup>112</sup> A finding that hostile-environment sexual harassment is violative of Title VII is a finding that the challenged conduct is "sufficiently severe or pervasive to alter the conditions of . . . employment and create an abusive working environment."<sup>113</sup> Conduct that does not meet that standard is not regulated by, and therefore does not violate, the statute. Employment discrimination law need not give way to invasion of privacy law in that circumstance. Rosen's position on cases in which gender discrimination is not clear is difficult to assess and agree or disagree with in the abstract, although one could imagine scenarios in which offensive jokes and vulgar e-mails could give rise to a hostile environment. Imagine the employee who is subjected or otherwise exposed to a barrage of sexual jokes by supervisors or coworkers, or is the recipient of a number of vulgar e-mails, including sexually explicit pictures. If that employee objects to and does not welcome these communications and finds them offensive, sexual harassment law may be implicated. As for Rosen's reference to consensual affairs, such affairs would not constitute sexual harassment if by consensual he means or would include welcome and not just voluntary relationships.<sup>114</sup>

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110. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), discussed *supra* notes 65-76 and accompanying text; *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), discussed *supra* notes 40-53 and accompanying text.

111. ROSEN, *supra* note 8, at 94-95.

112. Rosen stated this point differently in his June 2000 *New Republic* article:

But speech and conduct that some employees may find offensive but that has no *tangible consequences* for employment should be recognized for what it is: not a form of gender discrimination but an invasion of the offended person's privacy. By reconceiving harassment, the law could protect people's legitimate rights without imposing a cure as dangerous as the disease.

Rosen, *supra* note 12.

113. *Meritor*, 477 U.S. at 67.

114. On this point, the Supreme Court has made it clear that the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome' . . . the correct

Following a discussion of the separate and distinct issue of sexual favoritism<sup>115</sup> and the work of Catherine MacKinnon,<sup>116</sup> Professor Rosen attempts to demonstrate the way in which sexual harassment law has strayed from the text of Title VII. In his view, *Meritor*

might have held that Taylor's constant sexual demands on Vinson clearly changed the terms and conditions of her employment because of sex—an obvious violation of the text of Title VII. Instead, Chief Justice William H. Rehnquist departed from the text of Title VII, holding that Taylor had discriminated against Vinson by creating a sexually charged hostile and offensive working environment.<sup>117</sup>

Did the Court depart from the text of the statute and render an implausible decision based on an incredible reading of the statute? Title VII's express prohibition of sex discrimination did not provide a specific answer to the specific question of whether sexual harassment violated the law. It is also true that the Congress enacting Title VII in 1964 was not concerned about and did not intend to prohibit sexual harassment.<sup>118</sup> Construing Title VII and filling this statutory gap, the Court examined the text of the statute and concluded that it was not limited to economic or tangible discrimination; agreed with the views of the EEOC expressed in that agency's sex discrimination guidelines; considered and relied on federal appeals courts' decisions applying the antidiscrimination principle to racial, religious, and national origin harassment; and noted the uniform holdings of the federal courts of appeals recognizing a cause of action for hostile-environment harassment based on sex.<sup>119</sup> And the Court did in fact conclude that Taylor's conduct and creation of a hostile environment could change Vinson's terms and conditions of employment.

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inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Id.* at 68.

115. See ROSEN, *supra* note 8, at 96-102. Rosen poses hypotheticals involving Jennifer Flowers and Bill Gates and an actual case decided by the United States Court of Appeals for the Second Circuit, *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304 (1986), wherein the court held that the "proscribed differentiation under Title VII . . . must be a distinction based on a person's sex, not on his or her sexual affiliation." *Id.* at 306-07 (citation omitted). The court distinguished sexual favoritism from sexual harassment, noting that "Title VII claims have been employed successfully to combat instances of sex discrimination with respect to terms and conditions of employment . . . as well as sexual harassment in the workplace . . ." *Id.* at 307 (citations omitted). "In all of these cases . . . there existed a causal connection between the gender of the individual or class and the resultant preference or disparity." *Id.*

116. ROSEN, *supra* note 8, at 102-05.

117. ROSEN, *supra* note 8, at 106.

118. See *supra* notes 15-16 and accompanying text.

119. See *Meritor*, 477 U.S. at 64-67.

While Rosen is correct that the Court “did not provide a clear definition of what, precisely, hostile environment harassment was,”<sup>120</sup> he is on shakier ground when he writes that the Court did not say why such harassment “should be viewed as a form of sex discrimination . . . .”<sup>121</sup> In discussing and adopting the view of the EEOC, the Court noted that the agency’s guidelines recognized that sexual harassment was prohibited where “such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”<sup>122</sup> The Court also quoted the Fifth Circuit’s decision in *Rogers v. EEOC*<sup>123</sup> and that court’s explanation that a working environment charged with and polluted by racial and ethnic discrimination could “destroy completely the emotional and psychological stability of minority group workers . . . .”<sup>124</sup> And, as noted *supra*, the Supreme Court quoted the Eleventh Circuit’s statement that environmental harassment “is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality,” and that requiring individuals to “run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.”<sup>125</sup> That the Court could have said more on the subject should not obscure the fact that its opinion does offer some explanation as to why hostile-environment sexual harassment constitutes sex discrimination under Title VII.

What was the impact of *Meritor*? “The hostile environment test transformed the nature of the workplace by blurring the boundaries of the public and private spheres,” Rosen contends.<sup>126</sup>

By allowing women (or men) to complain about any sexually oriented speech or conduct that they found hostile or abusive, the new test allowed aggrieved coworkers to object to overheard jokes and to e-mail, suggestive pictures, or even their colleagues’ consensual flirtation, even if the men in question never intended their conduct to be offensive, and the women to whom the conduct was directed didn’t perceive it to be offensive. . . . the “hostility” or “offensiveness” of the speech became the test of whether or not, in legal terms, harm had been suffered.<sup>127</sup>

In what sphere, public or private or some combination of the two

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120. ROSEN, *supra* note 8, at 107.

121. *Id.*

122. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3)).

123. 454 F.2d 234 (5th Cir. 1971).

124. *Id.* at 238; 477 U.S. at 66.

125. *Meritor*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

126. ROSEN, *supra* note 8, at 107.

127. *Id.*

(however defined), is the workplace? In other contexts, an employer may believe that his or her facility is not a public or open forum and that it may regulate certain conduct of its employees, including certain speech, in order to promote discipline and production.<sup>128</sup> On that view of the workplace, employees enter into the employer's sphere for the purpose of performing the tasks for which they were hired, and certain conduct hindering production or creating issues requiring disciplinary employer action may be regulated and prohibited. No employee subject to lawful employer rules and regulations is free to act in the workplace as he or she would act in a public sphere. If Rosen is correct that antiharassment law has (in his view, problematically) blurred public and private boundaries, the question remains whether any such blurring is reasonable and beneficial to employees given the specific context of the workplace, the employer-employee relationship, and Title VII's antidiscrimination mandate.

Note that Professor Rosen also states that employees may complain even when men did not intend to offend and women to whom the conduct was directed were not offended. Of course, a person ignorant of or oblivious to the offensive nature of his or her speech or conduct may nonetheless say or do something offensive. Adopting a perpetrator view of the offensiveness of harassment would allow the "I didn't know" or "I didn't know better" or "boys will be boys" defenses, even when the conduct is objectively and subjectively offensive and unwelcome to the complainant. And while it is true that employees can certainly complain about conduct directed to others who did not find it offensive, the Supreme Court has required that the challenged conduct must actually offend the complainant. Moreover, and for the sake of accuracy, Professor Rosen's statement that the hostility or offensiveness of the speech is the test even where "harm had not been suffered" does not accurately state the law. To reiterate, hostile or offensive speech, standing alone, is not enough; the speech must be sufficiently severe or pervasive to harm the complainant as a result of the discriminatory alteration of the conditions of the target's employment and the creation of an abusive working environment.

Professor Rosen is also critical of the Supreme Court's 1993 decision in *Harris v. Forklift Sys., Inc.*<sup>129</sup> In his view, "the Court blandly reaffirmed the hostile environment test without acknowledging any of the confusion it had provoked."<sup>130</sup> He criticized Justice O'Connor's opinion for the Court as providing "no useful guidelines for defining whether or not conduct was 'discriminatory,' 'severe or pervasive,' or 'hostile or abusive,' or how to measure the sensibility of a 'reasonable person.'"<sup>131</sup> Whether useful or not,

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128. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

129. 510 U.S. 17 (1993).

130. ROSEN, *supra* note 8, at 108.

131. *Id.* at 109.

O'Connor did set forth factors to be examined under a totality-of-circumstances standard.<sup>132</sup> That the Court has formulated a standard and not a rule is understandable given the statutory language<sup>133</sup> and the need to apply the law to numerous and fact-specific scenarios.

"How could sexual harassment law be refined so that it protects privacy instead of threatening it?"<sup>134</sup> In Rosen's view, it is beyond refinement.

[T]he hostile environment test has proved more distracting than clarifying in identifying illegal gender discrimination, and . . . should be reoriented toward the text of Title VII of the 1964 Civil Rights Act. Judges and juries in harassment cases should focus on this question: can the disputed speech or conduct be viewed as a form of discrimination "because of sex"?<sup>135</sup>

He also concludes that "any evidence of pervasive gender-based animosity, or of differential treatment of women based on stereotypical views about their abilities, would change the terms and conditions of employment in a way that would obviously constitute discrimination because of sex."<sup>136</sup> In his view, such misconduct would violate Title VII by depriving employees of work opportunities and could adversely affect their status as employees because of their sex. "This covers the gauntlet situations that seem to be more common in blue-collar professions, in which women are forced to endure a pattern of sexist taunts and abuse on a daily basis."<sup>137</sup>

Is this not the very same or similar analysis and prohibition found in current law? Under both that law and Rosen's purported change in the law, Title VII would prohibit and regulate gender-based misconduct that is pervasive and treats women or men differently and alters their terms and conditions of employment, including the "gauntlets of sexual abuse" noted by the Supreme Court<sup>138</sup> and highlighted by Rosen. This is not a change in or reform of the law; it is merely the deletion of a label and a change in terminology that leaves in place an aspect of harassment law Rosen has supposedly targeted for elimination.

Professor Rosen further contends that the abandonment of the environmental harassment claim "leaves only one category of sexual harassment that might be less closely regulated by Title VII": "speech and

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132. See *supra* note 61 and accompanying text.

133. See *Harris*, 510 U.S. at 24 (Scalia, J., concurring) ("I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts.").

134. ROSEN, *supra* note 8, at 111.

135. *Id.*

136. *Id.* at 112.

137. *Id.* (footnote omitted).

138. *Meritor*, 477 U.S. at 67.



conduct of a sexual nature that can't plausibly be characterized as sex discrimination."<sup>139</sup> This is confusing given his prior statement that certain speech and conduct, such as the gauntlet, can be actionable discrimination. What kind of conduct falls in the "less closely regulated" category?

This might include unwanted advances, suggestive looks and gestures, sexual joking and teasing, and the display of sexually explicit material that carry no implicit or explicit threat of retaliation, don't change the terms and conditions of employment, and don't deprive any individual of employment opportunities or adversely affect his or her status as an employee because of sex, but are nevertheless annoying and offensive.<sup>140</sup>

The reader should ask whether such conduct constitutes actionable and remediable hostile environment harassment under current law (in my view, it would not). In the absence of retaliation, an alteration in employment conditions, or the deprivation of employment opportunities, a plaintiff would not have a valid claim and the law would not change if this aspect of Rosen's proposal were adopted.

What does Professor Rosen offer as a replacement for the Title VII hostile environment harassment test? Stating that "the indignity of hostile environment harassment can often be defined more precisely, as an invasion of privacy,"<sup>141</sup> he proposes that "in cases where there are no tangible employment consequences, invasion of privacy law is better equipped than gender discrimination law to distinguish truly egregious violations, which should be illegal, from merely offensive and inappropriate behavior, which should not."<sup>142</sup> While intentional torts (battery, assault, false imprisonment, and outrage) can be utilized to regulate "intentionally hurtful and harassing behavior"<sup>143</sup> (a well settled and in no way novel legal response to harassment),<sup>144</sup> what he calls the "gray area" of allegedly harassing conduct<sup>145</sup> can be regulated by the tort of

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139. ROSEN, *supra* note 8, at 112.

140. *Id.* at 112.

141. *Id.* at 115. "The privacy violation takes the form of invading the boundaries of a person who has indicated, directly or indirectly, that he or she wishes to remain inaccessible." *Id.* at 116.

142. *Id.* at 117. I would add that merely offensive and inappropriate behavior, standing alone, are not illegal.

143. *Id.* at 118.

144. See Ronald Turner, *Employer Liability under Title VII for Hostile Environment Sexual Harassment by Supervisory Personnel: The Impact and Aftermath of Meritor Sav. Bank*, 33 HOW. L.J. 1, 2 n.2 (1990) (noting that "other doctrinal vehicles have been utilized to address workplace sexual harassment. Employees may bring suit under state fair employment laws which prohibit sex discrimination, or may opt for state tort, contract, or statutory actions."). See also EPSTEIN, *supra* note 5, at 350-66 (discussing common-law and Title VII sexual harassment claims).

145. This is Rosen's gray area: "But many sexual harassment allegations fall short of

invasion of privacy, more specifically the tort of intrusion on seclusion.<sup>146</sup> (Why these tort actions have not adequately deterred sexual harassment to date is not addressed by Rosen.)

Professor Rosen's emphasis on privacy as the (and not just a) fundamental concern in hostile environment cases is troublesome in two respects. First, concentrating exclusively on privacy may unduly emphasize the sexual aspects of the harassment and shift the focus away from the penultimate questions of whether and how the challenged conduct adversely affected the environment and employment opportunities of the person bringing the claim. Second, and related to the previous point, the harms and in some cases horrors of hostile environment harassment cannot and should not be reduced to one or a few predetermined and selected legal constructs. Environmental claims are complex. "Their complexity lies in the multiple conceptions and causes of the harm, the interactive and contextual character of the injury, the blurriness of the boundaries between legitimate and wrongful conduct, and the structural and interactive requirements of an effective remedy."<sup>147</sup> Furthermore, protecting an individual's privacy and dignity are important, as are their rights to pursue their economic, social and political goals and to rely on the protection of and the benefits afforded by the federal antidiscrimination mandate.

Citing a number of cases decided by courts in the state of Alabama,<sup>148</sup> Professor Rosen argues that the intrusion on seclusion tort "sets the bar high enough so that relatively trivial indignities are no longer actionable."<sup>149</sup> In Rosen's view, the common law approach is also better than the hostile environment test because it will be easier for juries to decide whether the challenged conduct is "highly offensive to a reasonable person" and therefore "serious enough so that any reasonable person, man or woman, would consider it an unambiguous violation of privacy."<sup>150</sup> It is not apparent how or why this common-law test is easier to apply or is preferable to the Title VII question of whether a reasonable person would find the challenged conduct sufficiently severe or pervasive to alter the target's employment conditions and create an abusive work environment.

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conduct plainly intended to harm or humiliate, and look more like boorish advances that the plaintiff failed to make clear were unwelcome and that the defendant insensitively pressed despite the warnings he may have received. . . ." ROSEN, *supra* note 8, at 118.

146. See RESTATEMENT (SECOND) OF TORTS § 652B (1977): One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

147. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 469 (2001).

148. ROSEN, *supra* note 8, at 119-21, 120 n.56.

149. *Id.* at 120.

150. *Id.*

Under both formulations, a judge or jury will have to consider the facts and circumstances of each case and decide whether the conduct is sufficiently offensive to support or warrant a finding of illegality. Indeed, the Title VII formulation is arguably more precise and workplace-specific than the more general intrusion on seclusion approach.

One attractive byproduct of the shift to tort law for Professor Rosen is the benefit enjoyed by employers. "Courts have also been more reluctant to impose liability on employers in privacy suits than they are in gender discrimination suits."<sup>151</sup> He argues that the "tort model would encourage individual responsibility by placing the blame for inappropriate conduct on the perpetrator, rather than the employer, in cases where the conduct took place in private spaces and the employer neither knew about it nor could have been expected to know about it."<sup>152</sup> This approach "gives employers less of an incentive than does gender discrimination law to punish relatively trivial offenses, where the costs of regulation are often greater than the harm that the regulations are designed to prevent."<sup>153</sup> For Rosen, tort law "would increase the incentives for women to protect their own dignity rather than passively relying on employers to protect it for them," would decrease the economic incentive to file "marginal harassment suits," and "would increase the possibility of understanding between the sexes by encouraging women or men to complain when they feel offended."<sup>154</sup>

Is this approach superior to the Title VII regime? That employers may experience difficulties in monitoring acts of hostile environment harassment in their workplaces has not escaped the attention of the Supreme Court. In its 1998 decisions, the Court provided employers with an affirmative defense to liability or damages and encouraged the development of antiharassment policies encouraging employees to come forward so that the employer can learn of and stop harassing conduct by supervisors, including such conduct that has not yet become severe or pervasive.<sup>155</sup> Courts have also held in a number of cases that employers are only liable for nonsupervisory coworker harassment where the employer knew or should have known of the misconduct and did not take steps to stop and correct it.<sup>156</sup> When the employer has not observed or otherwise learned of the alleged coworker harassment, employees must report the harassment to the employer, must put the company on notice. That regime may be better for both employers and employees from a legal as well as

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151. *Id.* at 120-21.

152. *Id.* at 122.

153. *Id.*

154. *Id.*

155. *See Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *supra* notes 78-87 and accompanying text.

156. *See, e.g., Mason v. So. Ill. Univ. at Carbondale*, 233 F.3d 1036, 1043 (7th Cir. 2000); *Courtney v. Landair Transport, Inc.*, 227 F.3d 559, 564 (6th Cir. 2000).

personnel policy perspective in that "it encourages proactive steps to produce information and build capacity to problem solve by rewarding effective results with reduced liability."<sup>157</sup>

One further and practical point concerning employer antiharassment policies. An employer policy will not (should not) be limited to sexual harassment.<sup>158</sup> Instead, it should apply to harassment on the basis of sex, race, color, national origin, religion, disability, and other characteristics.<sup>159</sup> Adoption of Rosen's eliminationist proposal would mean that forms of harassment other than sexual harassment would be regulated and would require employer monitoring and preventive and corrective mechanisms. Rosen does not state or in any way suggest that racial or other analogous harassment causes of action raising employer monitoring and privacy issues should be eliminated, and I would be interested in his views on whether and how sexual harassment is different.

With respect to placing legal responsibility on the perpetrator and not the employer, such a change could result in fewer cases against judgment-proof defendants who would be unable to pay any or all of a judgment obtained by a target. Fewer cases may result in reduced deterrence as employers no longer fearful of liability relax their monitoring. Rosen may think that this is a good thing as viewed from the perspective of the employer. But that perspective is not the only one. Harassed employees and the public, speaking through Title VII, have a different view which should be considered and weighed in the analysis.

As for Rosen's contention that invasion of privacy law gives employers less incentive to punish "relatively trivial offenses," employers would be well advised to respond to and stop such conduct that may fall short of the legal definition of harassment but are still hurtful and offensive and subordinating, and nip them in the bud before they do become severe and pervasive. As for Rosen's view that women (and men?) subjected to harassment passively rely on employers to protect their dignity, the passivity he perceives may actually be an understandable reluctance of harassment targets to expose themselves to the risks, real and imagined, of reporting the conduct.<sup>160</sup> One person's passive reliance is another person's

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157. Sturm, *supra* note 147, at 483.

158. For an example of a policy covering and prohibiting sexual and other forms of harassment, see *Saxe v. State College Area School Dist.*, 240 F.3d 200, 202-03 (3d Cir. 2001).

159. Racial harassment cases: *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074 (3d Cir. 1996); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971). National origin: *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (*per curiam*). Religion: *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976). Disability: *Flowers v. So. Reg'l Physician Servs., Inc.*, 247 F.3d 229 (5th Cir. 2001); *Breda v. Wolf Camera & Video*, 222 F.3d 886 (11th Cir. 2000).

160. See *Grossman*, *supra* note 78, at 723 ("The literature suggests that many victims are

difficult real-world dilemma—report the harassment or remain silent and grin or frown but bear it.<sup>161</sup>

Professor Rosen also argues that using tort law instead of Title VII hostile environment law makes it “easier for employers to reconstruct private spaces, inside and outside the workplace, in which employees can express themselves without fear of being monitored and observed.”<sup>162</sup> A “properly managed workplace will tolerate relaxed ‘backstage’ areas, to give employees a place of refuge from social expectations.”<sup>163</sup> Rosen quotes the work of another author published in 1963, before the enactment of Title VII:

The backstage language consists of reciprocal first-naming, co-operative decision-making, profanity, open sexual remarks, elaborate griping, smoking, rough informal dress, ‘sloppy’ sitting and standing posture, use of dialect or substandard speech, mumbling and shouting, playful aggressivity and ‘kidding,’ inconsiderateness for the other in minor but potentially symbolic acts, minor physical self-involvements such as humming, whistling, chewing, nibbling, belching and flatulence.<sup>164</sup>

The backstage may not be an egalitarian area, Rosen writes, because it is “a place of retreat from social norms—a place where workers are free to be lustful, sloppy, indiscreet, or playful, to form intimate bonds, and to indulge in behavior that would be inappropriate if practiced in more formal areas of the workplace.”<sup>165</sup>

Where no backstage exists, male bonding is prohibited or discouraged and men “may retreat into less public spaces—moving the backstage area, in effect, into private offices, drinks after work, ball games on the weekend.”<sup>166</sup> And, Rosen continues, “the effect of creating a workplace culture where men feel inhibited from making jokes and sexual comments in public places may not be to increase opportunities for women, but to constrict them.”<sup>167</sup> Older men “may focus their energies on younger men, with whom they feel more comfortable and less threatened,” and will not “form[ ] intimate, mentoring relationships with younger women . . . .”<sup>168</sup>

I cannot agree with Professor Rosen that a backstage like the one

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reluctant, if not completely unwilling, to report sexual harassment to their employers.”).

161. Professor Grossman has noted that targets unwilling to report harassment to their employers may rationalize the harasser’s actions, blame themselves, deny that harassment has occurred, and may avoid the perpetrator or the site of the harassment. *See id.*

162. ROSEN, *supra* note 8, at 122.

163. *Id.* at 123.

164. *Id.*

165. *Id.* at 124.

166. *Id.*

167. *Id.* at 124-25.

168. *Id.* at 125.

described in his book is unquestionably necessary or beneficial and should be provided by an employer. An employer may understandably hesitate before providing (apparently male) supervisors and employees with an area in which they are not governed by “social expectations” and norms (including antidiscrimination laws and norms) and are free to curse, make sexual remarks, use dialect, belch, and so on. Is the backstage a safe area for the expression of explicit and degrading sexist and racist jokes and epithets? Just what are lustful and indiscreet individuals allowed to do in that space? What kind of inappropriate behavior is or should be acceptable in the backstage that would not be tolerated by employers and employees elsewhere in an employer’s facility? These are important questions that Rosen does not address. We should also be concerned that employees leaving the backstage may not immediately discontinue their backstage language and conduct once they return to work. Rather than bring this conduct into the workplace, employees desiring a backstage should find an off-site forum where they can let loose and bond and act in inappropriate ways.

Finally, Professor Rosen sets forth his view of the costs of the current hostile environment sexual harassment regime:

If the costs of the current harassment regime were limited to disrupting the careers of a small group of unfortunate employees who have failed to adjust quickly enough to the transformation in social norms that govern interactions between men and women at work, then they would be easy enough for society to bear. All of us should try to behave like ladies and gentlemen in every sphere of our lives, and at this stage in our gender politics, anyone who is reckless enough to treat colleagues, employees, students, and fellow citizens with less than Victorian respect should hardly be surprised by the ignominy that will follow. But the real costs of harassment law are not simply the careers that it disrupts and the workplaces that it fills with confusion and uncertainty. The costs are, more generally, to the boundaries between the public sphere and the private sphere in America.<sup>169</sup>

This assessment of the “real costs” reflects his general view that hostile environment harassment is often trivial and is not that big a deal, at least not big enough to be the subject of federal regulation. That appraisal is, of course, debatable. Others may value the privacy rights and interests of those individuals subjected to harassment more than the privacy interests of harassers or employers fearful of liability, thereby placing the real costs on perpetrators and employers who know of and do nothing about harassing behavior. This is not about acting like ladies and gentlemen or Victorians; it is about conducting oneself in a way that does not subject

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169. *Id.* at 127.

another human being to conduct that pollutes his or her work environment and interferes with the right to work under the same terms and conditions provided to other employees. The costs incurred and benefits obtained in promoting this equality and in providing legal relief to those who have prevailed in hostile environment litigation must be compared to and measured against the costs imposed on career-impaired harassers and the confused. While Professor Rosen's focus on the latter flows from his view that hostile environment harassment is about privacy, others (including this writer) believe that workplace equality is worth the coin.

#### IV. CONCLUSION

Professor Rosen's provocative proposal to abolish the Title VII action for hostile-environment sexual harassment warrants serious contemplation and critique. In my view, and for the reasons set forth in this paper, his proposal should not be adopted because it rests upon several flawed foundations and analytical misconceptions, including the urge to eliminate the hostile environment claims as a reaction to the asserted mistreatment of third parties in a few cases, his puzzling argument that the hostile-environment test is a departure from the text of Title VII, his failure to recognize the ways in which an exclusive focus on his conception of privacy fails to account for the specific dynamics and harms of environmental workplace harassment, his call for the adoption of a clarifying common-law tort standard as a substitute for what may very well be a relatively more precise statutory tort standard developed and applied by the courts in Title VII cases, and his judgment that the real costs are to the privacy and interests of employers and perpetrators rather than the employees subjected to workplace harassment.